82-356

No.

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In the Supreme Court of the United States

October Term, 1982

ROBERT D. STIGLER,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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QUESTIONS PRESENTED

Question 1: Whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest inculpatory statement which was obtained after the petitioner had invoked his right to consult counsel and to remain silent and immediately following a statement by an arresting officer that "any assistance given by him would be noted to the district attorney and judge."

Question 2: Whether, under the Fourth Amendment, a valid search warrant may be issued on the premise that a confidential informant was "known" by the prosecuting attorney.

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No.

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The petitioner, Robert D. Stigler, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in this proceeding on May 19, 1982, Petition for Rehearing denied on June 30, 1982.

OPINION BELOW

The opinion and judgment of the court below was rendered *per curiam* and is reported 415 So. 2d 686.

PARTIES TO THIS PETITION

All parties to the proceeding in this court are listed in the caption of the case.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 19, 1982. A timely petition for rehearing *en banc* was denied on June 30, 1982, and this petition for certiorari was filed within sixty (60) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of the United States, Amendment V provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

The Constitution of the United States, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The Constitution of the United States, Amendment XIV provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privlieges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition presents significant federal constitutional issues concerning the permissible scope of a custodial interrogation of the accused and the validity of a search warrant. The Mississippi Supreme Court decided both federal questions in a way which clearly conflicts with applicable decisions of this court.

At approximately 11:00 o'clock a.m. on February 11, 1981, Ricky Banks, the sheriff of Leflore County, Mississippi; Dennis McAnally, an agent of the Mississippi Bureau of Narcotics; and Charles Swayzee, the county attorney for Leflore County, Mississippi, appeared before a Justice Court Judge seeking the issuance of a warrant authorizing the search of the petitioner's residence for contraband thought to be thereon consisting of a quantity of marijuana.

The affidavit requesting the issuance of the search warrant, together with the appended sheet setting forth the alleged underlying facts and circumstances upon which the officers relied to supply probable cause for issuance of the warrant, was prepared by Mr. Swayzee, the county attorney, on the basis of information related to him by Sheriff Banks and Agent McAnally.

After the affidavit was prepared by the county attorney, it was presented to the magistrate by the county at-

torney, the sheriff, and the narcotics agent. The testimony of the officers was taken by the judge and the affidavit was signed by them in the presence of the judge. The only testimony offered in connection with the issuance of the warrant consisted solely of the officers reading to the judge the affidavit for the search warrant together with the underlying facts and circumstances. The only persons present before the judge were the two officers and the county attorney.

Based upon the affidavit and the description of the underlying facts and circumstances, the judge issued the search warrant under the authority of which the petitioner's property was entered by the officers and a search was conducted which yielded the contraband which formed the basis of the subsequent indictment and conviction of the petitioner.

The affidavit for the search warrant, after the formal charging parts, incorporated a sheet labeled "underlying facts and circumstances". The underlying facts and circumstances alleged by Banks and McAnally were:

> "We, the undersigned, affiants, Ricky Banks and Dennis McAnally, being first duly sworn according to law, do hereby depose and state as follows:
>
> "On the morning of February 11, 1981, a confidential informant, who the undersigned believe to be reliable and trustworthy based on the information he provided to us on this date (and) because some of such information is corroborated by other independent sources, who have also provided us reliable information in the past which proved to be correct, that Robert D. Stigler had approximately five hundred pounds of Marijuana in his possession on Monday, February 2, 1981. The confidential informant observed this Marijuana at

Robert D. Stigler's residence as described in the attached search warrant. The confidential informant has observed Marijuana in the past on more than one occasion and is familiar with Marijuana for identification purposes. Within the last twenty-four hours Robert D. Stigler advised the confidential informant that he still had possession of this Marijuana at the same address as described in the attached search warrant . The confidential informant stated that the Marijuana is packaged in approximately twenty pound brick packages.

"This confidential informant has personally been known by the Assistant District Attorney of the Fourth Judicial District of Mississippi for the past 10 years and in his opinion the confidential informant is reliable and trustworthy and has proved to be reliable and trustworthy in his dealings with the assistant District Attorney over the past ten years.

"Based on the above information we respectfully request that a search warrant be issued authorizing and directing the search of the residence of Robert D. Stigler as described on the attached affidavit.

"s/ Dennis K. McAnally
AFFIANT

"s/ Ricky Banks
AFFIANT"

Based solely on the testimony described above, a search warrant was issued authorizing the search of the petitioner's residence. The sheriff and other officers then went to the residence where they forced open a door and conducted the search which resulted in the discovery of a substantial quantity of marijuana.

The petitioner returned to his residence late the same evening. He discovered the forced entry and the search warrant. Thereafter, he voluntarily reported to the sheriff's office in Leflore County, Mississippi, and was arrested and charged with the possession of more than one kilogram of marijuana in violation of the provisions of *Mississippi Code Annotated*, §41-29-139(d)(2)(D) (1972).

Richard Oakes, an agent with the Mississippi Bureau of Narcotics, testified that he participated in the search of the petitioner's residence and also testified that at approximately 11:30 o'clock p.m. on the same day he was notified that the petitioner was at the sheriff's office and that he went there to begin "the processing" which consisted in part of advising the petitioner of what is commonly referred to as the "Miranda warnings". After having been so advised, the petitioner executed a Miranda warning form and invoked his right to remain silent and to obtain the assistance of counsel to represent him.

After the Miranda warnings were given and the form was executed, Oakes asked the petitioner if he wished to make a statement. The petitioner informed him that he did not want to make a statement and that fact was noted on the Miranda form. The petitioner further stated that he would like to confer with his attorney. However, Oakes then stated to the petitioner that if he wished to provide the names of persons that he might know that were involved in the distribution of drugs or to provide any other information or assistance that he might be able to provide the Bureau in making any cases against any other individuals, that his assistance would be duly noted to the district attorney and to the judge. Immediately following this offer, the petitioner was alleged to have made the following statement while in custody:

"I shouldn't have had the stuff in the house."

This statement was allegedly made just after Oakes had advised the petitioner that any assistance given by him would be noted to the district attorney or to the judge.

Subsequently, the petitioner was indicted for the offense of possession of more than one kilogram of marijuana. He was tried and convicted in the Circuit Court of Leflore County, Mississippi, and was sentenced to serve a mandatory term of three years in the Mississippi State Penitentiary without pardon or parole and to pay a fine of Ten Thousand Dollars ($10,000).

During the trial, the petitioner repeatedly objected to the introduction of any evidence seized from his home as a result of the defective search warrant and objected to the introduction of the inculpatory statement made during a period of custodial interrogation. The objections were overruled. The petitioner appealed his conviction to the Mississippi Supreme Court which affirmed the judgment of the Circuit Court.

REASONS FOR GRANTING THE WRIT

The petitioner was denied his constitutional right securing the privilege against self-incrimination and his right to have the assistance of counsel.

After he voluntarily surrendered to the sheriff, petitioner was advised of his "Miranda rights". He repeatedly indicated that he did not intend to make any statement and that he wished to confer with his attorney. Nevertheless, while he was being booked or "processed" into the Leflore County Jail, an agent of the Mississippi Bureau of Narcotics told petitioner that if he would provide names of persons who were involved in the distribution of drugs or any other information or assistance in

"making any cases against any other individuals", his assistance would be duly noted to the judge. Immediately thereafter, the petitioner reportedly said to the agent: "I shouldn't have had the stuff in the house". When the statement was made, the petitioner was actually in custody. The nature of the exchange constituted an interrogation.

In *Miranda v. Arizona*, 384 U. S. 436 (1966) this Court held at 444:

> "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

More recently, in *Brewer v. Williams*, 430 U. S. 387 (1977), the Court specifically held that the Sixth and Fourteenth Amendments forbid a deliberate design or scheme on the part of the police to elicit information from the accused while he is isolated from his lawyer. In *Brewer* the Court held that the "Christian burial speech" was tantamount to interrogation initiated after the accused had indicated his desire to remain silent and to confer with his attorney.

In the present case, the petitioner, after having exercised his Miranda rights, was offered an inducement for "making any cases against other individuals". This offer was made and designed to elicit an incriminating response from the accused. The officer admitted he promised that cooperation would be reported to the district attorney and to the court.

This Court recently considered a similar factual situation in *Rhode Island v. Innis*, 446 U. S. 291 (1980) and held at 300 *et seq.*:

> "It is clear therefore that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.
>
> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under the Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Subsequently, in *Edwards v. Arizona*, 451 U. S. 477, 482 (1982) the Court reaffirmed the *Miranda* holding that: (a) if the accused indicates that he wishes to remain silent, "the interrogation must cease" and (b) if the accused requests counsel, "the interrogation must cease until an attorney is present." Edwards also held that once an accused has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation until counsel has been made available to him *unless the accused himself initiates further communications, exchanges or conversations with the police.*

In *Rhode Island v. Innis, supra* the Court refined the *Miranda* test. First, the suspect must be "in custody", a fact which is not disputed here. Second, the suspect must be subject to "interrogation" after asserting his Miranda rights. If the purported interrogation is not direct or in a customary form it must be "established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis, supra* at 303.

The petitioner here was in actual custody. He had repeatedly invoked his Miranda rights including the right to remain silent and to confer with his attorney before making any statement. Nevertheless, he was subject to an inducement which was clearly and specifically designed to elicit an incriminating response. He was offered the prospect of prosecutorial and judicial leniency in exchange for cooperation. Immediately thereafter he reportedly made an inculpatory admission which, over objection, was offered into evidence at his trial.

The sufficiency of the affidavit underlying the search warrant in this case is gauged by the ruling of this court in *Aguilar v. Texas*, 378 U. S. 108 (1964) where the Court held at 114 that although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U. S. 257 (1960), the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed, see *Rugendorf v. United States*,

376 U. S. 528 (1964), was "credible" or his information "reliable".

In this case, the petitioner concedes that the first test of *Aguilar* - the basis of knowledge test - is met. The petitioner, however, strongly contends that the second requirement of *Aguilar* - the reliability of the informant test - was not met.

The affidavit and "underlying facts and circumstances" were not drafted by a policeman in the midst of an investigation. Compare, *United States v. Ventresca,* 380 U. S. 102 (1965). They were drafted by a trained, experienced prosecuting attorney.

By what appears as almost an afterthought, the prosecuting attorney, as author of the affidavit inserted as part of the testimony of the affiants (Banks and McAnally) the statement that the confidential informant had been known by the prosecuting attorney for ten years and that the informant was reliable and trustworthy in the opinion of the unsworn attorney. It is clear that the hearsay statement of the prosecuting attorney as to his personal belief in the reliability of the confidential informant does not constitute sufficient basis for a finding of probable cause that the affiants themselves had sufficient grounds to conclude that the confidential informant was credible or reliable. Moreover, it is evident that the allegations do not contain any facts whatsoever upon which the Assistant District Attorney based his opinion of reliability. By admitting into evidence the fruits of the search made pursuant to this warrant, the Mississippi Supreme Court clearly decided a federal question in a way which conflicts with the decision of this Court in *Aguilar v. Texas, supra.*

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Writ of Certiorari be granted to review the judgment of the Supreme Court of Mississippi.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, William Liston, attorney for petitioner, Robert D. Stigler, have this date mailed a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi to the Honorable Amy Whitten, Assistant Attorney General, State of Mississippi, Carol Gartin Building, Jackson, Mississippi.

Certified, this the 27th day of August, 1982.

WILLIAM LISTON

APPENDIX

APPENDIX A

ROBERT D. STIGLER	)	Conviction of Possession of
	)	Marijuana and Sentence of
#53,240 V	)	Three (3) Years Affirmed.
	)	
STATE	)	May 19, 1982

APPENDIX B

ROBERT D. STIGLER	)	Petition for Rehearing De-
	)	nied.
#53,240 V	)	
	)	June 30, 1982
STATE	)	

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STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether petitioner's voluntary statement that "I shouldn't have had the stuff in my house," made after he had been issued a full slate of *Miranda* warnings and had declined to make a statement until he conferred with counsel, and after the cessation of interrogation, was a spontaneous and voluntary utterance, free of coercion?

II.

Whether a search warrant may be issued on an underlying affidavit which asserts that a confidential informant has proven reliable and trustworthy in past dealings with a prosecuting attorney?

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion and judgment of the court below were rendered *per curiam* and are reported at 415 So.2d 686.

PARTIES TO THIS PETITION

All parties to the proceeding in this Court are listed in the caption of the case.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has sufficiently identified and set forth the constitutional provisions involved in this cause.

STATEMENT OF THE CASE

The two issues raised in this petition, relating to the nature of a post-arrest inculpatory statement and the sufficiency of an affidavit underlying a search warrant, were resolved on direct appeal to the Mississippi Supreme Court in a manner fully in harmony with applicable decisions of this Court.

At approximately 11:00 a.m. on February 11, 1981, three persons representing law enforcement in Leflore County, Mississippi, acting on information received from a confidential informant, appeared before a Justice Court Judge seeking issuance of a search warrant for the residence owned and occupied by petitioner on the belief that a large amount of marijuana was secreted there. In support of the warrant request, an affidavit, together with an appended sheet setting forth the underlying facts and circumstances establishing probable cause for issuance of the warrant,[1] was prepared by the Leflore County Attorney on the basis of information relayed to him by the affiants, a Bureau of Narcotics state agent and the Leflore County Sheriff.

Based on the affidavit, the accompanying statement of facts and circumstances, and oral testimony taken in the presence of the judge, the search warrant was issued and a lawful search of petitioner's home followed shortly thereafter. When officers entered the residence, petitioner was not at home; thus the search was conducted in his absence

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1. This document is reprinted in petitioner's Statement of the Case at pp. 4-5.

and yielded some 200 pounds of marijuana, found hidden in air conditioning ducts and in a barn on the property adjacent to the house. When petitioner returned home later that day, he discovered a copy of the warrant return and at approximately 11:30 p.m. that night, surrendered himself at the Leflore County Sheriff's Office.

Pursuant to his appearance and arrest, a Sheriff's Deputy began routine processing and paperwork. Accordingly, Deputy Richard Oakes administered the full slate of *Miranda* warnings, after which petitioner signed an official waiver of rights form. He was at that time coherent and appeared to be sober and in full control of his faculties. He stated he did not wish to make a statement and Officer Oakes immediately ceased with any manner of interrogation. However, Oakes, in passing, told petitioner that if he wished to provide names of others involved in drug distribution, his assistance would be noted to the district attorney and/or the judge. *Petitioner replied that he would like to confer with his attorney about such action.* Officer Oakes agreed and in no way pushed the issue further. Some few minutes later, petitioner spontaneously exclaimed that he shouldn't have had the "stuff" at his house. This statement was later admitted into evidence at trial though challenged by the defense as the direct result of coercive interrogation. Later, when petitioner took the stand in his own behalf, he denied ever having made the statement. The petitioner was indicted for the offense of possession of more than one kilogram of marijuana. He was tried and convicted in the Circuit Court of Leflore County, Mississippi, and sentenced to serve a mandatory term of three years in the Mississippi State Penitentiary without pardon or parole and to pay a fine of Ten Thousand Dollars ($10,000). The conviction and sentence were affirmed *per curiam* by the Mississippi Supreme Court on May 19, 1982, and petition for rehearing was denied on June 30, 1982.

REASONS FOR DENYING THE WRIT

The parties to this cause are in agreement on several points integral to the analysis of the affidavit underlying the search warrant which eventually produced the contraband for which petitioner stands convicted. It is undisputed that this Court's ruling in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) embodies the standard by which the present affidavit must be gauged. The two-pronged test of *Aguilar* established constituted guidelines for measuring hearsay information in a probable cause setting, either as a predicate for a warrant or for acting, under appropriate circumstances, without a warrant. *Aguilar* was concerned with the trustworthiness of hearsay. The bipartite test articulated therein includes: [1] A "Basis of Knowledge" Prong and [2] a "Veracity" Prong. The latter may be neatly bisected into: [a] A "Credibility" Spur and [b] a "Reliability" Spur. *Aguilar* requires that both the "basis of knowledge" prong and the "veracity" prong be satisfied.

The "basis of knowledge" prong requires of him who would act upon hearsay, a knowledge of some of the underlying circumstances upon which the informant based his conclusion. The "veracity" prong, on the other hand, appears in the alternative and requires of him who would act upon hearsay, a knowledge of some of the underlying circumstances which leads to the conclusion that the informant is (1) "credible or (2) his information reliable."

Petitioner concedes that the first test of *Aguilar*—the "basis of knowledge" test—is satisfied by the present affidavit. It is rather on the second test—the reliability of the informant's information or his credibility—that the parties' interpretation of the facts and law diverges

and conflicts. It is the position of the state that the affidavit here in issue comports which the specificity required by *Aguilar* and its progeny and in no way offends constitutional guidelines.

Expressly, *Aguilar* requires that the magistrate examining an affidavit be shown therefrom ". . . *some* of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'" (378 U.S. at 114) Thus, this "veracity" prong apparent in *Aguilar* in precise terms has two disjunctive spurs, seeking either (a) the inherent "credibility" of the source himself or (b) some other circumstances reasonably assuring the "reliability" of the information on the particular occasion of its being furnished.

[a] "Credibility" Spur

While cases following *Aguilar* have interpreted this portion of the test to be most commonly satisfied by averments that "an informer is credible if he has provided truthful tips in the past," *Strode v. State*, 231 So.2d 779 (Miss. 1970), proof of credibility is of course by no means limited to that fact. All informants are employed for "a first time" and on their initial use, which forms the basis for later inherent credibility, they may be deemed credible by other means. A portion of the present affidavit states that the confidential informant was believed by the affiants to be credible based on

> ". . . the information he provided to us on this date and because some of such information is corroborated by other independent sources, who have also provided us reliable information in the past which proved to be correct, ..."

This assertion of previous reliability of the sources corroborating the informant's statements may be deemed func-

tionally equivalent to assertion of the informant's past credibility. Additionally, a later quote from that same document sets forth another basis of establishment of the informant's credibility. Specifically, the statement in support of the affidavit avers that

> This confidential informant has personally been known by the Assistant District Attorney of the Fourth Judicial District of Mississippi for the past ten (10) years, and in his opinion the confidential informant is reliable and trustworthy and has proven to be reliable and trustworthy in his dealings with the Assistant District Attorney over the past 10 years.

Petitioner argues that the unnamed assistant attorney vouching for the credibility of the informant does not suffice in the absence of a voucher by the two officers whose names appear as affiants. This is an obviously erroneous conclusion since courts have held that an affidavit which asserts reliability by reference to a third party who verifies the informant's truthfulness, need not identify that source, especially where it embodies a source involved in law enforcement. In *United States v. Jeffers*, 621 F.2d 221 (5th Cir. 1980), it is stated as follows:

> Jeffers argues that the second prong of the test was not met by the affidavit because it failed to state that the affiant had prior personal dealings with the informant or to include the identity of the IRS agent who vouched for the informant's credibility. "No averment by the police officer explicitly endorsing the informant's reliability is required, however." United States v. Weinrich, 586 F.2d 481, 490 (5th Cir. 1978), cert. denied, 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979). It is sufficient that the affiant received his information regarding the informant's reliability from the IRS. See United States v. Williams,

603 F.2d 1168 (5th Cir. 1979); Smith v. United States, 358 F.2d 833, 834 (D.C. Cir. 1966), cert. denied, 386 U.S. 1008, 87 S.Ct. 1350, 18 L.Ed.2d 448 (1967). 621 F.2d at 226-227.

Certainly the affiants had just cause to conclude that an assistant district attorney was credible and they had equal reason to believe his assertions as to the credibility of the informant over a ten year period.

[b] "Reliability" Spur

The "veracity" prong of *Aguilar* is significantly phrased in the disjunctive. Assuming that the magistrate's knowledge of the informant's credibility is "zero", he may alternatively ask, "Was the information furnished under circumstances giving reasonable assurances of trustworthiness?" If so, the information is "reliable," notwithstanding the ignorance as to its source's credibility.

Obviously there is some distinction between an informant's "credibility" and the "reliability" of his information. Informational "reliability", as something separate from it source's credibility, would seem to involve some circumstances assuring trustworthiness on the particular occasion of its being furnished. See: *Ratliff v. State*, 310 So.2d 905, 906 (Miss. 1975).

In the case at bar the informant told the affiants that he physically and personally observed marijuana in petitioner's residence. He went on to describe the packaging of the contraband and to divulge the substance of conversations he had with petitioner concerning the location of the marijuana. Portions of this information were directly corroborated by other persons whose credibility had been established through past dealings with law enforcement personnel. This "independent corroboration" creates additional support of respondent's position based

on this Court's holding in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 2 L.Ed.2d 637 (1969). *Spinelli* devised, or at least enunciated, substitute means for satisfying Aguilarian demands on the issue of veracity. This therapeutic device was identified in *Strode v. State* as follows: ". . . the information may be deemed reliable if corroborated by independent investigation." 231 So.2d at p. 783. When the internal recitation of some of the underlying circumstances which led the officer to conclude that his informant was "credible" or his information "reliable" has not been sufficient to satisfy *Aguilar's* "veracity" prong directly, this buttressing technique—independent investigation—comes into play to determine whether it can "fairly be said that the [informant's] tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration." *Spinelli*, 393 U.S. at p. 415.

Perhaps the affidavit in question could have been more perfectly drawn, but that is not here the issue. All that is required is that it show *some* facts and circumstances from which the magistrate could have found the existence of probable cause.

We respectfully invite this Court to approach the affidavit at bar in the spirit evidenced by the Court's opinion in *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), wherein it was observed that ". . . affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion." 380 U.S. at p. 108. Reading *Ventresca* further, we find the following:

> "However, where these [underlying] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate

> has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Jones v. United States, supra, 362 U.S. [257], at 270, 80 S.Ct. [725], at 735, [4 L.Ed.2d 697 at 707, 78 A.L.R. 2d 233]." 380 U.S. at p. 109. (emphasis supplied)

In this same vein, the Mississippi Supreme Court in *Meyer v. State*, 309 So.2d 161, 165-66 (Miss. 1973) said:

> We follow the rule that provisions for search and seizures are strictly construed against the state. However, when the circumstances are detailed, the reason for crediting the source of information is given, and the judicial officer has found probable cause, we will interpret the affidavit in a common sense manner. Where the question is close as to probable cause, we will give preference to the warrant. • • •

See also: *Washington v. State*, 382 So.2d 1986 (Miss. 1980); *Joyce v. State*, 327 So.2d 255 (Miss. 1976).

The *Ventresca* mandate, we think, invites reviewing courts to read possibly ambiguous language with an eye toward validating a warrant rather than striking it down. Construed in that manner, the present affidavit presents no constitutional abridgment and one must conclude that prong II of the *Aguilar* test has been satisfied.

Petitioner's second claim of entitlement to a writ of certiorari is predicated on a post-arrest statement he made to arresting officer Randy Oakes. As indicated earlier in this response, petitioner freely surrendered himself to

authorities. He was quickly given the full panoply of *Miranda* warnings and signed a waiver of rights form. He declined to make a statement and questioning ceased. The precise chronology of the next exchange between Oakes and petitioner reveals that Oakes stated that any assistance via names or information petitioner could supply would be duly noted to the district attorney and/or the judge. At this point, petitioner declined to respond until he had conferred with his attorney. Verbal contact between the two men halted immediately until some very few minutes later when petitioner blurted out that he shouldn't have had the "stuff" at his house. It is this unsolicited statement upon which petitioner now seeks reversal, labelling it a product of impermissible custodial interrogation as defined by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and related cases. We submit that the statement in question was totally uncoerced and irresponsive to any verbal contact between petitioner and Officer Oakes.

Miranda, supra, concisely sought to eradicate those instances "in which a person has indicated his desire to exercise his constitutional right of silence but the police refuse to take 'no' for an answer." *Jennings v. United States*, 391 F.2d 512, 515 (5th Cir. 1968), cert. den. 393 U.S. 868, 89 S.Ct. 154, 21 L.Ed.2d 136 (1968). Certainly, Officer Oakes accepted petitioner's desire to halt the questioning, as indicated by his testimony that he did not ask *any* questions following petitioner's decision to stop. The protections of *Miranda* were in no way violated by a freely tendered confession. It is on this point that *Miranda* is most explicit:

> Volunteered statements *of any kind* are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. 384 U.S. at 478.

More recently, in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 682, 64 L.Ed.2d 297 (1980), this Court refined and rephrased the fundamental *Miranda* consideration of what constitutes impermissible interrogation versus volunteered statements by a suspect. Specifically, the Court stated the following:

> This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in *Miranda* noted:
>
> > "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated . . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* at 478, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 Ohio Misc. 9, 36 Ohio Ops.2d 237, 10 A.L.R.3d 974 (emphasis added). 446 U.S. at 300.

The holding in *Rhode Island v. Innis* proceeds to clearly explain that *Miranda* does not come into play until interrogation can be shown to have elicited an incriminating response. It is without dispute that "police cannot be held accountable for the unforseen results of their words or actions" *id.* at 302. Further,

> . . . the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

> . . . It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response. This was not established in the present case. *id.*

The dispositive fact in the present case is that petitioner's statement was not the product of interrogation, but rather an uncoerced utterance. Petitioner was neither drunk or mentally disadvantaged as evidenced by his well thought out decision to speak with an attorney before responding to questioning. Moreover, when given the opportunity to divulge "names or information", he flatly declined. Obviously, he knew he was under no compulsion to speak with police and now bears no resemblance to persons described by this Court in *Rhode Island v. Innis*. Certainly, while petitioner's statement might, in restrospect, appear foolish, it was not forced by police and does not constitute a meritful claim before this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Amy D. Whitten, Special Assistant Attorney General State of Mississippi, have this date mailed a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to the Honorable William Liston, Liston, Crull, and Gibson, 128 North Quitman Avenue, Post Office Box 645, Winona, Mississippi, 38967.

Certified, this the 13th day of December, 1982.

/s/ AMY D. WHITTEN
Special Assistant Attorney General
State of Mississippi

82-356

No.

Office - Supreme Court, U.S.
FILED
AUG 30 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

October Term, 1982

ROBERT D. STIGLER,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

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QUESTIONS PRESENTED

Question 1: Whether the Fifth, Sixth, and Fourteenth Amendments require suppression of a post-arrest inculpatory statement which was obtained after the petitioner had invoked his right to consult counsel and to remain silent and immediately following a statement by an arresting officer that "any assistance given by him would be noted to the district attorney and judge."

Question 2: Whether, under the Fourth Amendment, a valid search warrant may be issued on the premise that a confidential informant was "known" by the prosecuting attorney.

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No.

In the Supreme Court of the United States

October Term, 1982

ROBERT D. STIGLER,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

The petitioner, Robert D. Stigler, respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Mississippi entered in this proceeding on May 19, 1982, Petition for Rehearing denied on June 30, 1982.

OPINION BELOW

The opinion and judgment of the court below was rendered *per curiam* and is reported 415 So. 2d 686.

PARTIES TO THIS PETITION

All parties to the proceeding in this court are listed in the caption of the case.

JURISDICTION

The judgment of the Supreme Court of Mississippi was entered on May 19, 1982. A timely petition for rehearing *en banc* was denied on June 30, 1982, and this petition for certiorari was filed within sixty (60) days of that date. The jurisdiction of this court is invoked under 28 U.S.C. §1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitution of the United States, Amendment IV provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The Constitution of the United States, Amendment V provides in pertinent part:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."

The Constitution of the United States, Amendment VI provides in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defence."

The Constitution of the United States, Amendment XIV provides in pertinent part:

> "No state shall make or enforce any law which shall abridge the privlieges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

This petition presents significant federal constitutional issues concerning the permissible scope of a custodial interrogation of the accused and the validity of a search warrant. The Mississippi Supreme Court decided both federal questions in a way which clearly conflicts with applicable decisions of this court.

At approximately 11:00 o'clock a.m. on February 11, 1981, Ricky Banks, the sheriff of Leflore County, Mississippi; Dennis McAnally, an agent of the Mississippi Bureau of Narcotics; and Charles Swayzee, the county attorney for Leflore County, Mississippi, appeared before a Justice Court Judge seeking the issuance of a warrant authorizing the search of the petitioner's residence for contraband thought to be thereon consisting of a quantity of marijuana.

The affidavit requesting the issuance of the search warrant, together with the appended sheet setting forth the alleged underlying facts and circumstances upon which the officers relied to supply probable cause for issuance of the warrant, was prepared by Mr. Swayzee, the county attorney, on the basis of information related to him by Sheriff Banks and Agent McAnally.

After the affidavit was prepared by the county attorney, it was presented to the magistrate by the county at-

torney, the sheriff, and the narcotics agent. The testimony of the officers was taken by the judge and the affidavit was signed by them in the presence of the judge. The only testimony offered in connection with the issuance of the warrant consisted solely of the officers reading to the judge the affidavit for the search warrant together with the underlying facts and circumstances. The only persons present before the judge were the two officers and the county attorney.

Based upon the affidavit and the description of the underlying facts and circumstances, the judge issued the search warrant under the authority of which the petitioner's property was entered by the officers and a search was conducted which yielded the contraband which formed the basis of the subsequent indictment and conviction of the petitioner.

The affidavit for the search warrant, after the formal charging parts, incorporated a sheet labeled "underlying facts and circumstances". The underlying facts and circumstances alleged by Banks and McAnally were:

> "We, the undersigned, affiants, Ricky Banks and Dennis McAnally, being first duly sworn according to law, do hereby depose and state as follows:
>
> "On the morning of February 11, 1981, a confidential informant, who the undersigned believe to be reliable and trustworthy based on the information he provided to us on this date (and) because some of such information is corroborated by other independent sources, who have also provided us reliable information in the past which proved to be correct, that Robert D. Stigler had approximately five hundred pounds of Marijuana in his possession on Monday, February 2, 1981. The confidential informant observed this Marijuana at

Robert D. Stigler's residence as described in the attached search warrant. The confidential informant has observed Marijuana in the past on more than one occasion and is familiar with Marijuana for identification purposes. Within the last twenty-four hours Robert D. Stigler advised the confidential informant that he still had possession of this Marijuana at the same address as described in the attached search warrant . The confidential informant stated that the Marijuana is packaged in approximately twenty pound brick packages.

"This confidential informant has personally been known by the Assistant District Attorney of the Fourth Judicial District of Mississippi for the past 10 years and in his opinion the confidential informant is reliable and trustworthy and has proved to be reliable and trustworthy in his dealings with the assistant District Attorney over the past ten years.

"Based on the above information we respectfully request that a search warrant be issued authorizing and directing the search of the residence of Robert D. Stigler as described on the attached affidavit.

"s/ Dennis K. McAnally
AFFIANT

"s/ Ricky Banks
AFFIANT"

Based solely on the testimony described above, a search warrant was issued authorizing the search of the petitioner's residence. The sheriff and other officers then went to the residence where they forced open a door and conducted the search which resulted in the discovery of a substantial quantity of marijuana.

The petitioner returned to his residence late the same evening. He discovered the forced entry and the search warrant. Thereafter, he voluntarily reported to the sheriff's office in Leflore County, Mississippi, and was arrested and charged with the possession of more than one kilogram of marijuana in violation of the provisions of *Mississippi Code Annotated*, §41-29-139(d)(2)(D) (1972).

Richard Oakes, an agent with the Mississippi Bureau of Narcotics, testified that he participated in the search of the petitioner's residence and also testified that at approximately 11:30 o'clock p.m. on the same day he was notified that the petitioner was at the sheriff's office and that he went there to begin "the processing" which consisted in part of advising the petitioner of what is commonly referred to as the "Miranda warnings". After having been so advised, the petitioner executed a Miranda warning form and invoked his right to remain silent and to obtain the assistance of counsel to represent him.

After the Miranda warnings were given and the form was executed, Oakes asked the petitioner if he wished to make a statement. The petitioner informed him that he did not want to make a statement and that fact was noted on the Miranda form. The petitioner further stated that he would like to confer with his attorney. However, Oakes then stated to the petitioner that if he wished to provide the names of persons that he might know that were involved in the distribution of drugs or to provide any other information or assistance that he might be able to provide the Bureau in making any cases against any other individuals, that his assistance would be duly noted to the district attorney and to the judge. Immediately following this offer, the petitioner was alleged to have made the following statement while in custody:

"I shouldn't have had the stuff in the house."

This statement was allegedly made just after Oakes had advised the petitioner that any assistance given by him would be noted to the district attorney or to the judge.

Subsequently, the petitioner was indicted for the offense of possession of more than one kilogram of marijuana. He was tried and convicted in the Circuit Court of Leflore County, Mississippi, and was sentenced to serve a mandatory term of three years in the Mississippi State Penitentiary without pardon or parole and to pay a fine of Ten Thousand Dollars ($10,000).

During the trial, the petitioner repeatedly objected to the introduction of any evidence seized from his home as a result of the defective search warrant and objected to the introduction of the inculpatory statement made during a period of custodial interrogation. The objections were overruled. The petitioner appealed his conviction to the Mississippi Supreme Court which affirmed the judgment of the Circuit Court.

REASONS FOR GRANTING THE WRIT

The petitioner was denied his constitutional right securing the privilege against self-incrimination and his right to have the assistance of counsel.

After he voluntarily surrendered to the sheriff, petitioner was advised of his "Miranda rights". He repeatedly indicated that he did not intend to make any statement and that he wished to confer with his attorney. Nevertheless, while he was being booked or "processed" into the Leflore County Jail, an agent of the Mississippi Bureau of Narcotics told petitioner that if he would provide names of persons who were involved in the distribution of drugs or any other information or assistance in

"making any cases against any other individuals", his assistance would be duly noted to the judge. Immediately thereafter, the petitioner reportedly said to the agent: "I shouldn't have had the stuff in the house". When the statement was made, the petitioner was actually in custody. The nature of the exchange constituted an interrogation.

In *Miranda v. Arizona*, 384 U. S. 436 (1966) this Court held at 444:

> "The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination. By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way."

More recently, in *Brewer v. Williams*, 430 U. S. 387 (1977), the Court specifically held that the Sixth and Fourteenth Amendments forbid a deliberate design or scheme on the part of the police to elicit information from the accused while he is isolated from his lawyer. In *Brewer* the Court held that the "Christian burial speech" was tantamount to interrogation initiated after the accused had indicated his desire to remain silent and to confer with his attorney.

In the present case, the petitioner, after having exercised his Miranda rights, was offered an inducement for "making any cases against other individuals". This offer was made and designed to elicit an incriminating response from the accused. The officer admitted he promised that cooperation would be reported to the district attorney and to the court.

This Court recently considered a similar factual situation in *Rhode Island v. Innis*, 446 U. S. 291 (1980) and held at 300 *et seq.*:

> "It is clear therefore that the special procedural safeguards outlined in Miranda are required not where a suspect is simply taken into custody, but rather where a suspect in custody is subjected to interrogation. 'Interrogation,' as conceptualized in the Miranda opinion, must reflect a measure of compulsion above and beyond that inherent in custody itself.
>
> "We conclude that the Miranda safeguards come into play whenever a person in custody is subjected to either express questioning or its functional equivalent. That is to say, the term 'interrogation' under the Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect."

Subsequently, in *Edwards v. Arizona*, 451 U. S. 477, 482 (1982) the Court reaffirmed the *Miranda* holding that: (a) if the accused indicates that he wishes to remain silent, "the interrogation must cease" and (b) if the accused requests counsel, "the interrogation must cease until an attorney is present." Edwards also held that once an accused has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation until counsel has been made available to him *unless the accused himself initiates further communications, exchanges or conversations with the police.*

In *Rhode Island v. Innis, supra* the Court refined the *Miranda* test. First, the suspect must be "in custody", a fact which is not disputed here. Second, the suspect must be subject to "interrogation" after asserting his Miranda rights. If the purported interrogation is not direct or in a customary form it must be "established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response." *Rhode Island v. Innis, supra* at 303.

The petitioner here was in actual custody. He had repeatedly invoked his Miranda rights including the right to remain silent and to confer with his attorney before making any statement. Nevertheless, he was subject to an inducement which was clearly and specifically designed to elicit an incriminating response. He was offered the prospect of prosecutorial and judicial leniency in exchange for cooperation. Immediately thereafter he reportedly made an inculpatory admission which, over objection, was offered into evidence at his trial.

The sufficiency of the affidavit underlying the search warrant in this case is gauged by the ruling of this court in *Aguilar v. Texas*, 378 U. S. 108 (1964) where the Court held at 114 that although an affidavit may be based on hearsay information and need not reflect the direct personal observations of the affiant, *Jones v. United States*, 362 U. S. 257 (1960), the magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant whose identity need not be disclosed, see *Rugendorf v. United States*,

376 U. S. 528 (1964), was "credible" or his information "reliable".

In this case, the petitioner concedes that the first test of *Aguilar* - the basis of knowledge test - is met. The petitioner, however, strongly contends that the second requirement of *Aguilar* - the reliability of the informant test - was not met.

The affidavit and "underlying facts and circumstances" were not drafted by a policeman in the midst of an investigation. Compare, *United States v. Ventresca*, 380 U. S. 102 (1965). They were drafted by a trained, experienced prosecuting attorney.

By what appears as almost an afterthought, the prosecuting attorney, as author of the affidavit inserted as part of the testimony of the affiants (Banks and McAnally) the statement that the confidential informant had been known by the prosecuting attorney for ten years and that the informant was reliable and trustworthy in the opinion of the unsworn attorney. It is clear that the hearsay statement of the prosecuting attorney as to his personal belief in the reliability of the confidential informant does not constitute sufficient basis for a finding of probable cause that the affiants themselves had sufficient grounds to conclude that the confidential informant was credible or reliable. Moreover, it is evident that the allegations do not contain any facts whatsoever upon which the Assistant District Attorney based his opinion of reliability. By admitting into evidence the fruits of the search made pursuant to this warrant, the Mississippi Supreme Court clearly decided a federal question in a way which conflicts with the decision of this Court in *Aguilar v. Texas*, *supra*.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Writ of Certiorari be granted to review the judgment of the Supreme Court of Mississippi.

Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, William Liston, attorney for petitioner, Robert D. Stigler, have this date mailed a true and correct copy of the above and foregoing Petition for a Writ of Certiorari to the Supreme Court of the State of Mississippi to the Honorable Amy Whitten, Assistant Attorney General, State of Mississippi, Carol Gartin Building, Jackson, Mississippi.

Certified, this the 27th day of August, 1982.

WILLIAM LISTON

APPENDIX

APPENDIX A

ROBERT D. STIGLER	)	Conviction of Possession of
	)	Marijuana and Sentence of
#53,240 V	)	Three (3) Years Affirmed.
	)	
STATE	)	May 19, 1982

APPENDIX B

ROBERT D. STIGLER	)	Petition for Rehearing De-
	)	nied.
#53,240 V	)	
	)	June 30, 1982
STATE	)	

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FILED
DEC 2 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-356

In the Supreme Court of the United States

October Term, 1982

ROBERT D. STIGLER,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I.

Whether petitioner's voluntary statement that "I shouldn't have had the stuff in my house," made after he had been issued a full slate of *Miranda* warnings and had declined to make a statement until he conferred with counsel, and after the cessation of interrogation, was a spontaneous and voluntary utterance, free of coercion?

II.

Whether a search warrant may be issued on an underlying affidavit which asserts that a confidential informant has proven reliable and trustworthy in past dealings with a prosecuting attorney?

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No. 82-356

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ROBERT D. STIGLER,
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VS.

STATE OF MISSISSIPPI,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MISSISSIPPI

BRIEF IN OPPOSITION

OPINION BELOW

The opinion and judgment of the court below were rendered *per curiam* and are reported at 415 So.2d 686.

PARTIES TO THIS PETITION

All parties to the proceeding in this Court are listed in the caption of the case.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has sufficiently identified and set forth the constitutional provisions involved in this cause.

STATEMENT OF THE CASE

The two issues raised in this petition, relating to the nature of a post-arrest inculpatory statement and the sufficiency of an affidavit underlying a search warrant, were resolved on direct appeal to the Mississippi Supreme Court in a manner fully in harmony with applicable decisions of this Court.

At approximately 11:00 a.m. on February 11, 1981, three persons representing law enforcement in Leflore County, Mississippi, acting on information received from a confidential informant, appeared before a Justice Court Judge seeking issuance of a search warrant for the residence owned and occupied by petitioner on the belief that a large amount of marijuana was secreted there. In support of the warrant request, an affidavit, together with an appended sheet setting forth the underlying facts and circumstances establishing probable cause for issuance of the warrant,[1] was prepared by the Leflore County Attorney on the basis of information relayed to him by the affiants, a Bureau of Narcotics state agent and the Leflore County Sheriff.

Based on the affidavit, the accompanying statement of facts and circumstances, and oral testimony taken in the presence of the judge, the search warrant was issued and a lawful search of petitioner's home followed shortly thereafter. When officers entered the residence, petitioner was not at home; thus the search was conducted in his absence

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1. This document is reprinted in petitioner's Statement of the Case at pp. 4-5.

and yielded some 200 pounds of marijuana, found hidden in air conditioning ducts and in a barn on the property adjacent to the house. When petitioner returned home later that day, he discovered a copy of the warrant return and at approximately 11:30 p.m. that night, surrendered himself at the Leflore County Sheriff's Office.

Pursuant to his appearance and arrest, a Sheriff's Deputy began routine processing and paperwork. Accordingly, Deputy Richard Oakes administered the full slate of *Miranda* warnings, after which petitioner signed an official waiver of rights form. He was at that time coherent and appeared to be sober and in full control of his faculties. He stated he did not wish to make a statement and Officer Oakes immediately ceased with any manner of interrogation. However, Oakes, in passing, told petitioner that if he wished to provide names of others involved in drug distribution, his assistance would be noted to the district attorney and/or the judge. *Petitioner replied that he would like to confer with his attorney about such action.* Officer Oakes agreed and in no way pushed the issue further. Some few minutes later, petitioner spontaneously exclaimed that he shouldn't have had the "stuff" at his house. This statement was later admitted into evidence at trial though challenged by the defense as the direct result of coercive interrogation. Later, when petitioner took the stand in his own behalf, he denied ever having made the statement. The petitioner was indicted for the offense of possession of more than one kilogram of marijuana. He was tried and convicted in the Circuit Court of Leflore County, Mississippi, and sentenced to serve a mandatory term of three years in the Mississippi State Penitentiary without pardon or parole and to pay a fine of Ten Thousand Dollars ($10,000). The conviction and sentence were affirmed *per curiam* by the Mississippi Supreme Court on May 19, 1982, and petition for rehearing was denied on June 30, 1982.

REASONS FOR DENYING THE WRIT

The parties to this cause are in agreement on several points integral to the analysis of the affidavit underlying the search warrant which eventually produced the contraband for which petitioner stands convicted. It is undisputed that this Court's ruling in *Aguilar v. Texas*, 378 U.S. 108, 84 S.Ct. 1509, 12 L.Ed.2d 723 (1964) embodies the standard by which the present affidavit must be gauged. The two-pronged test of *Aguilar* established constituted guidelines for measuring hearsay information in a probable cause setting, either as a predicate for a warrant or for acting, under appropriate circumstances, without a warrant. *Aguilar* was concerned with the trustworthiness of hearsay. The bipartite test articulated therein includes: [1] A "Basis of Knowledge" Prong and [2] a "Veracity" Prong. The latter may be neatly bisected into: [a] A "Credibility" Spur and [b] a "Reliability" Spur. *Aguilar* requires that both the "basis of knowledge" prong and the "veracity" prong be satisfied.

The "basis of knowledge" prong requires of him who would act upon hearsay, a knowledge of some of the underlying circumstances upon which the informant based his conclusion. The "veracity" prong, on the other hand, appears in the alternative and requires of him who would act upon hearsay, a knowledge of some of the underlying circumstances which leads to the conclusion that the informant is (1) "credible or (2) his information reliable."

Petitioner concedes that the first test of *Aguilar*—the "basis of knowledge" test—is satisfied by the present affidavit. It is rather on the second test—the reliability of the informant's information or his credibility—that the parties' interpretation of the facts and law diverges

and conflicts. It is the position of the state that the affidavit here in issue comports which the specificity required by *Aguilar* and its progeny and in no way offends constitutional guidelines.

Expressly, *Aguilar* requires that the magistrate examining an affidavit be shown therefrom ". . . *some* of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.' " (378 U.S. at 114) Thus, this "veracity" prong apparent in *Aguilar* in precise terms has two disjunctive spurs, seeking either (a) the inherent "credibility" of the source himself or (b) some other circumstances reasonably assuring the "reliability" of the information on the particular occasion of its being furnished.

[a] "Credibility" Spur

While cases following *Aguilar* have interpreted this portion of the test to be most commonly satisfied by averments that "an informer is credible if he has provided truthful tips in the past," *Strode v. State,* 231 So.2d 779 (Miss. 1970), proof of credibility is of course by no means limited to that fact. All informants are employed for "a first time" and on their initial use, which forms the basis for later inherent credibility, they may be deemed credible by other means. A portion of the present affidavit states that the confidential informant was believed by the affiants to be credible based on

> ". . . the information he provided to us on this date and because some of such information is corroborated by other independent sources, who have also provided us reliable information in the past which proved to be correct, ..."

This assertion of previous reliability of the sources corroborating the informant's statements may be deemed func-

tionally equivalent to assertion of the informant's past credibility. Additionally, a later quote from that same document sets forth another basis of establishment of the informant's credibility. Specifically, the statement in support of the affidavit avers that

> This confidential informant has personally been known by the Assistant District Attorney of the Fourth Judicial District of Mississippi for the past ten (10) years, and in his opinion the confidential informant is reliable and trustworthy and has proven to be reliable and trustworthy in his dealings with the Assistant District Attorney over the past 10 years.

Petitioner argues that the unnamed assistant attorney vouching for the credibility of the informant does not suffice in the absence of a voucher by the two officers whose names appear as affiants. This is an obviously erroneous conclusion since courts have held that an affidavit which asserts reliability by reference to a third party who verifies the informant's truthfulness, need not identify that source, especially where it embodies a source involved in law enforcement. In *United States v. Jeffers*, 621 F.2d 221 (5th Cir. 1980), it is stated as follows:

> Jeffers argues that the second prong of the test was not met by the affidavit because it failed to state that the affiant had prior personal dealings with the informant or to include the identity of the IRS agent who vouched for the informant's credibility. "No averment by the police officer explicitly endorsing the informant's reliability is required, however." United States v. Weinrich, 586 F.2d 481, 490 (5th Cir. 1978), cert. denied, 441 U.S. 927, 99 S.Ct. 2041, 60 L.Ed.2d 402 (1979). It is sufficient that the affiant received his information regarding the informant's reliability from the IRS. See United States v. Williams,

603 F.2d 1168 (5th Cir. 1979); Smith v. United States, 358 F.2d 833, 834 (D.C. Cir. 1966), cert. denied, 386 U.S. 1008, 87 S.Ct. 1350, 18 L.Ed.2d 448 (1967). 621 F.2d at 226-227.

Certainly the affiants had just cause to conclude that an assistant district attorney was credible and they had equal reason to believe his assertions as to the credibility of the informant over a ten year period.

[b] "Reliability" Spur

The "veracity" prong of *Aguilar* is significantly phrased in the disjunctive. Assuming that the magistrate's knowledge of the informant's credibility is "zero", he may alternatively ask, "Was the information furnished under circumstances giving reasonable assurances of trustworthiness?" If so, the information is "reliable," notwithstanding the ignorance as to its source's credibility.

Obviously there is some distinction between an informant's "credibility" and the "reliability" of his information. Informational "reliability", as something separate from it source's credibility, would seem to involve some circumstances assuring trustworthiness on the particular occasion of its being furnished. See: *Ratliff v. State*, 310 So.2d 905, 906 (Miss. 1975).

In the case at bar the informant told the affiants that he physically and personally observed marijuana in petitioner's residence. He went on to describe the packaging of the contraband and to divulge the substance of conversations he had with petitioner concerning the location of the marijuana. Portions of this information were directly corroborated by other persons whose credibility had been established through past dealings with law enforcement personnel. This "independent corroboration" creates additional support of respondent's position based

on this Court's holding in *Spinelli v. United States*, 393 U.S. 410, 89 S.Ct. 584, 2 L.Ed.2d 637 (1969). *Spinelli* devised, or at least enunciated, substitute means for satisfying Aguilarian demands on the issue of veracity. This therapeutic device was identified in *Strode v. State* as follows: ". . . the information may be deemed reliable if corroborated by independent investigation." 231 So.2d at p. 783. When the internal recitation of some of the underlying circumstances which led the officer to conclude that his informant was "credible" or his information "reliable" has not been sufficient to satisfy *Aguilar's* "veracity" prong directly, this buttressing technique—independent investigation—comes into play to determine whether it can "fairly be said that the [informant's] tip, even when certain parts of it have been corroborated by independent sources, is as trustworthy as a tip which would pass *Aguilar's* tests without independent corroboration." *Spinelli*, 393 U.S. at p. 415.

Perhaps the affidavit in question could have been more perfectly drawn, but that is not here the issue. All that is required is that it show *some* facts and circumstances from which the magistrate could have found the existence of probable cause.

We respectfully invite this Court to approach the affidavit at bar in the spirit evidenced by the Court's opinion in *United States v. Ventresca*, 380 U.S. 102, 85 S.Ct. 741, 13 L.Ed.2d 684 (1965), wherein it was observed that ". . . affidavits for search warrants . . . must be tested and interpreted by magistrates and courts in a common sense and realistic fashion." 380 U.S. at p. 108. Reading *Ventresca* further, we find the following:

> "However, where these [underlying] circumstances are detailed, where reason for crediting the source of the information is given, and when a magistrate

> has found probable cause, the courts should not invalidate the warrant by interpreting the affidavit in a hypertechnical, rather than a common sense manner. Although in a particular case it may not be easy to determine when an affidavit demonstrates the existence of probable cause, the resolution of doubtful or marginal cases in this area should be largely determined by the preference to be accorded to warrants. Jones v. United States, supra, 362 U.S. [257], at 270, 80 S.Ct. [725], at 735, [4 L.Ed.2d 697 at 707, 78 A.L.R. 2d 233]." 380 U.S. at p. 109. (emphasis supplied)

In this same vein, the Mississippi Supreme Court in *Meyer v. State*, 309 So.2d 161, 165-66 (Miss. 1973) said:

> We follow the rule that provisions for search and seizures are strictly construed against the state. However, when the circumstances are detailed, the reason for crediting the source of information is given, and the judicial officer has found probable cause, we will interpret the affidavit in a common sense manner. Where the question is close as to probable cause, we will give preference to the warrant. • • •

See also: *Washington v. State*, 382 So.2d 1986 (Miss. 1980); *Joyce v. State*, 327 So.2d 255 (Miss. 1976).

The *Ventresca* mandate, we think, invites reviewing courts to read possibly ambiguous language with an eye toward validating a warrant rather than striking it down. Construed in that manner, the present affidavit presents no constitutional abridgment and one must conclude that prong II of the *Aguilar* test has been satisfied.

Petitioner's second claim of entitlement to a writ of certiorari is predicated on a post-arrest statement he made to arresting officer Randy Oakes. As indicated earlier in this response, petitioner freely surrendered himself to

authorities. He was quickly given the full panoply of *Miranda* warnings and signed a waiver of rights form. He declined to make a statement and questioning ceased. The precise chronology of the next exchange between Oakes and petitioner reveals that Oakes stated that any assistance via names or information petitioner could supply would be duly noted to the district attorney and/or the judge. At this point, petitioner declined to respond until he had conferred with his attorney. Verbal contact between the two men halted immediately until some very few minutes later when petitioner blurted out that he shouldn't have had the "stuff" at his house. It is this unsolicited statement upon which petitioner now seeks reversal, labelling it a product of impermissible custodial interrogation as defined by *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) and related cases. We submit that the statement in question was totally uncoerced and irresponsive to any verbal contact between petitioner and Officer Oakes.

Miranda, supra, concisely sought to eradicate those instances "in which a person has indicated his desire to exercise his constitutional right of silence but the police refuse to take 'no' for an answer." *Jennings v. United States*, 391 F.2d 512, 515 (5th Cir. 1968), cert. den. 393 U.S. 868, 89 S.Ct. 154, 21 L.Ed.2d 136 (1968). Certainly, Officer Oakes accepted petitioner's desire to halt the questioning, as indicated by his testimony that he did not ask *any* questions following petitioner's decision to stop. The protections of *Miranda* were in no way violated by a freely tendered confession. It is on this point that *Miranda* is most explicit:

> Volunteered statements *of any kind* are not barred by the Fifth Amendment and their admissibility is not affected by our holding today. 384 U.S. at 478.

More recently, in *Rhode Island v. Innis*, 446 U.S. 291, 100 S.Ct. 682, 64 L.Ed.2d 297 (1980), this Court refined and rephrased the fundamental *Miranda* consideration of what constitutes impermissible interrogation versus volunteered statements by a suspect. Specifically, the Court stated the following:

> This is not to say, however, that all statements obtained by the police after a person has been taken into custody are to be considered the product of interrogation. As the Court in *Miranda* noted:
>
> > "Confessions remain a proper element in law enforcement. Any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. The fundamental import of the privilege while an individual is in custody is not whether he is allowed to talk to the police without the benefit of warnings and counsel, but whether he can be interrogated . . . . Volunteered statements of any kind are not barred by the Fifth Amendment and their admissibility is not affected by our holding today." *Id.* at 478, 16 L.Ed.2d 694, 86 S.Ct. 1602, 10 Ohio Misc. 9, 36 Ohio Ops.2d 237, 10 A.L.R.3d 974 (emphasis added). 446 U.S. at 300.

The holding in *Rhode Island v. Innis* proceeds to clearly explain that *Miranda* does not come into play until interrogation can be shown to have elicited an incriminating response. It is without dispute that "police cannot be held accountable for the unforseen results of their words or actions" *id.* at 302. Further,

> . . . the definition of interrogation can extend only to words or actions on the part of police officers that they should have known were reasonably likely to elicit an incriminating response.

> . . . It must also be established that a suspect's incriminating response was the product of words or actions on the part of the police that they should have known were reasonably likely to elicit an incriminating response. This was not established in the present case. *id.*

The dispositive fact in the present case is that petitioner's statement was not the product of interrogation, but rather an uncoerced utterance. Petitioner was neither drunk or mentally disadvantaged as evidenced by his well thought out decision to speak with an attorney before responding to questioning. Moreover, when given the opportunity to divulge "names or information", he flatly declined. Obviously, he knew he was under no compulsion to speak with police and now bears no resemblance to persons described by this Court in *Rhode Island v. Innis*. Certainly, while petitioner's statement might, in restrospect, appear foolish, it was not forced by police and does not constitute a meritful claim before this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for Writ of Certiorari to the Supreme Court of Mississippi be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Amy D. Whitten, Special Assistant Attorney General State of Mississippi, have this date mailed a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to the Honorable William Liston, Liston, Crull, and Gibson, 128 North Quitman Avenue, Post Office Box 645, Winona, Mississippi, 38967.

Certified, this the 13th day of December, 1982.

/s/ AMY D. WHITTEN
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